No. 15782

United States
Court of Appeals
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

vs.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F. KELLER and DR. R. SYDNEY HANSEN,

Appellees.

Supplemental
Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—2-7-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. Civ. 7351

ADOLPH G. HOFFMAN,

Plaintiff,

vs.

ASHBY C. DICKSON, Judge; C. H. HALDEN; F. H. DAMMASCH, M.D., and G. F. KELLER, MD.; JOHN DOE, JANE DOE and RICHARD ROE,

Defendants.

COMPLAINT

Comes now the plaintiff, Adolph G. Hoffman, and deposes and says as a cause of action against the above-named defendants, and each of them:

I.

That on or about January 10, A.D. 1952, they did enter into a conspiracy to deprive said Plaintiff, Adolph G. Hoffman, of legal and constitutional rights and safeguards, and did thereby cause him to be deprived of his liberty and caused to be confined in the Eastern Oregon State Hospital at Pendleton, Oregon, for a period of seventy-nine days and some odd hours, and that such incarceration took place without due process of law.

II.

That, in violation of the general laws of the State of Oregon, and the Constitution of the State of

Oregon, the Constitution of the United States of America, and certain Civil Rights Statutes of the United States of America, a hearing was held in the court of Ashby C. Dickson, Judge of the Probate Court, County of Multnomah, State of Oregon, at which time the above-named plaintiff, Adolph G. Hoffman, was adjudged mentally ill, on the strength, in part, of affidavits, wholly or in part false, and signed and attested by the above-named defendants, F. H. Dammasch, M.D., and G. F. Keller, M.D.

III.

That, in violation of the general laws of the State of Oregon, and specifically Chapter 571, Oregon Laws of 1949, and the constitution of the United States, the above-named defendant, Ashby C. Dickson, as presiding judge of the above-named court of the County of Multnomah, State of Oregon, did refuse to allow the above-named plaintiff, Adolph G. Hoffman, the right to be represented by counsel.

IV.

That the above-named defendant, Ashby C. Dickson, accepted testimony, as a matter of record, and to the detriment of said plaintiff, from witnesses not present in court.

V.

That the above-named defendant, Ashby C. Dickson, did not require all of the complaining witnesses to be present at the alleged hearing.

VI.

That the above-named plaintiff, Adolph G. Hoffman, and/or his counsel were denied the right to cross-examine witnesses appearing against him.

VII.

That the above-named defendant, C. H. Halden, flimflammed and bamboozled and took advantage of the lack of legal knowledge of the above-named plaintiff, Adolph G. Hoffman, by convincing him beforehand that nothing would happen to him as a result of the above-said alleged hearing if he would keep silent and allow said C. H. Halden to speak for him.

VIII.

That the above actions by defendants and each of them caused plaintiff great and prolonged mental and physical anguish.

Wherefore, plaintiff, Adolph G. Hoffman, prays the court for relief and judgment against the above-named defendants and each of them, in actual damages to the amount of $1,200.00, with a further amount of $1,500,000.00 as punitive and exemplary damages, and for costs, and for any further relief which the court may deem proper and fitting.

/s/ ADOLPH G. HOFFMAN,
Plaintiff.

Duly verified.

[Endorsed]: Filed January 16, 1954.

[Title of District Court and Cause.]

ORDER DISMISSING CAUSE FOR FAILURE TO PROSECUTE

August 10, 1954

Now at this day It Is Ordered that this cause be, and is hereby, dismissed for failure to prosecute.

McC.

[Title of District Court and Cause.]

MOTION

Comes now plaintiff and moves the Court for an order to set aside the order of involuntary dismissal with prejudice entered on August 10, 1954, on the grounds and for the reasons set forth in the affidavit accompanying this motion and as provided in Federal Rules of Procedure, Rule 17, 55, 60(6) and ORS 12.160.

ROTH & TILBURY,

/s/ ROGER TILBURY,
Of Attorneys for Plaintiff.

[Endorsed]: Filed October 8, 1956.

[Title of District Court and Cause.]

ORDER VACATING ORDER OF DISMISSAL
(Nov. 1, 1956)

On motion of Roger Tilbury, of the firm of Roth & Tilbury, now based on evidence of the plaintiff and representations of counsel the order of August 10th, 1954, dismissing this cause for failure to prosecute is vacated and set aside.

Notified.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff and for an amended cause of action against defendants, and each of them, in accordance with Federal Rule of Civil Procedure No. 15 complains and alleges as follows:

I.

That plaintiff is a citizen of the United States of America and a resident of Multnomah County within this judicial District; that this Court has jurisdiction and under the provisions of U.S.C. Title 28, Section 1331, in that the cause of action herein arises under the Constitution of the United States and the statutes of the United States, to wit: U.S.C. Title 42, Section 1983, and under Title 28, Section 1343; the United States Constitution and the 14th Amendment.

II.

That at all times herein mentioned Dr. F. Sydney Hansen was and still is the County Health Officer of Multnomah County, Oregon.

III.

That at all times herein mentioned C. H. Halden was a Deputy County Health Officer of Multnomah County and acted as an agent of defendant Dr. F. Sydney Hansen and within the scope of his agency.

IV.

That at all times herein mentioned Dr. Donald E. Wair was and still is the Superintendent of the Oregon State Mental Hospital at Pendleton, Oregon.

V.

That at all times herein mentioned Dr. George F. Keller was and still is a duly licensed physician within the State of Oregon.

VI.

That on or about the 10th day of January, 1952, defendants C. H. Halden and Dr. F. Sydney Hansen acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving him of his liberty without due process of law by participat-

ing in connection with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of the plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By assuring plaintiff that his liberty or his rights would not be impaired in any way by the plaintiff's attendance at the hearing conducted in the Circuit Court of Multnomah County on or about the 10th day of January, 1952.

2. By refusing to permit plaintiff to call for his attorney in sufficient time for said attorney to appear at the said hearing in order to afford plaintiff representation in any respect.

3. By failing to summon the District Attorney or permit plaintiff to summon the District Attorney as required by the statute of the State of Oregon.

4. By failing to give plaintiff adequate notice of the nature of the hearing which was conducted on the aforementioned date.

5. By failing to apprise plaintiff of the nature of the hearing.

6. By failing to afford plaintiff the opportunity to summon witnesses in his own behalf when it became apparent that plaintiff would be given no op-

portunity to cross-examine witnesses which had been summoned against him.

7. By failing to remonstrate when plaintiff was excluded from hearing the evidence which was offered concerning his sanity.

8. By failing to obey the order of the Circuit Court of the County of Multnomah, State of Oregon, entered on October 4, 1952, which specifically directed that plaintiff be brought before said Court for further hearings but instead took plaintiff to a hospital where he was confined against his wishes.

9. By counseling plaintiff that it was unnecessary for him to obtain legal representation in connection with said hearing and by counseling plaintiff to remain silent and refuse to testify in his own behalf.

10. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities.

VII.

That on or about the 10th day of January, 1952, defendant, Dr. George F. Keller, acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill, wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving plaintiff of his liberty without due process of law by participating in connec-

tion with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By failing to remonstrate when plaintiff was excluded from hearing the evidence which was offered concerning his sanity.

2. By failing to remonstrate when it became apparent that plaintiff would be given no opportunity to cross-examine witnesses which had been summoned against him.

3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities.

4. That although said physician had been specifically ordered by the County Judge of the County of Multnomah, State of Oregon, to make an adequate medical examination concerning the alleged mental illness of plaintiff said physician failed to perform the duties required of him in connection with said order.

5. By signing and verifying the certificate together with Dr. Dammasch containing numerous statements which were not true.

6. By failing to remonstrate when it became apparent that plaintiff would not be given the hearing provided by the law of the State of Oregon; despite the fact that said defendant was fully conversant with the law relating to persons being mentally ill.

VIII.

That on or about the 6th day of October, 1952, defendant Dr. Donald E. Wair, acting under the color of the Oregon law relating to the commitment of persons charged with being mentally ill, wilfully and intentionally deprived plaintiff of his rights, privileges and immunities secured by the Constitution of the United States and the laws of the State of Oregon by depriving plaintiff of his liberty without due process of law by participating in connection with a hearing which was held in the Circuit Court of the County of Multnomah, State of Oregon, on or about the 10th day of January, 1952, and in connection with the subsequent confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, from the period of on or about the 5th day of August, 1952, to and including the 23rd day of October, 1952, in the following particulars, among others, to wit:

1. By failing to immediately release plaintiff after he was apprised of the fact that plaintiff had been confined to said hospital without due process of law.

2. By refusing to release plaintiff from said hospital until such time as plaintiff signed a release in

connection with a case filed by plaintiff against James Peake in the Circuit Court of the County of Multnomah despite the fact that it was apparent to said Doctor that plaintiff was not suffering from mental illness.

3. By refusing to apprise the proper authorities that plaintiff had been confined without due process of law.

IX.

That the aforesaid acts on the part of the defendants, and each of them, resulted in the confinement of plaintiff to the Oregon State Hospital at Pendleton, Oregon, against his express wishes and to his great embarrassment and mental anguish and caused him to lose his wages in the sum of $1,200.00 for that period of time.

X.

That as a result of the foregoing acts of the defendants, and each of them, plaintiff was intimidated, feared serious bodily harm, and suffered humiliation, indignity and nervous shock, and was deprived of his constitutional rights as set forth hereinabove to his damage in the sum of $25,000.00. The defendants, and each of them, acted wantonly, maliciously and arbitrarily by virtue whereof plaintiff is entitled to punitive damages in the sum of $100,000.00.

Wherefore, plaintiff prays for judgment against the defendants, and each of them, for the sum of $26,200.00 as actual damages; the sum of $100,-

000.00 as punitive damages; and for his costs and disbursements incurred herein.

ROTH & TILBURY,

/s/ ROGER TILBURY,
Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

ORDER DISMISSING AMENDED COMPLAINT

The motion to dismiss of Dr. F. Sydney Hansen and the motion to dismiss of C. H. Halden directed against plaintiff's amended complaint coming regularly before this court, the said defendants appearing by William M. Langley, their attorney, and the plaintiff appearing by his attorney, Roger Tilbury, and the court not being fully advised concerning defendants' contention that the within action is barred by the statute of limitations, and, therefore, not ruling thereon, and the court being fully advised concerning defendants' contention that the within-amended complaint fails to state a claim upon which relief can be granted,

It Is Hereby Ordered that plaintiff's amended complaint be dismissed upon the ground that it fails to state a claim upon which relief can be granted.

It Is Further Ordered that the plaintiff may have fifteen (15) days in which to file a second amended complaint.

Dated this 21st day of January, 1957.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed January 24, 1957.

[Title of District Court and Cause.]

ORDER DISMISSING AMENDED COMPLAINT WITH LEAVE TO AMEND

The above-entitled action having come on for decision on the motion to dismiss the amended complaint of the defendant Dr. Donald E. Wair, and the Court being of the opinion said motion is well taken, Now, Therefore,

It Is Hereby Ordered that the amended complaint herein be and the same is hereby dismissed as against the defendant Dr. Donald E. Wair, with leave to plaintiff to amend if so advised.

Dated this 21st day of February, 1957, at Portland, Oregon.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS SECOND AMENDED COMPLAINT

The defendant Dr. Donald E. Wair moves the court for an order as follows:

1. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because said second amended complaint fails to state a claim against said defendant upon which relief can be granted.

2. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because the claim alleged in said second amended complaint is barred by the applicable Oregon statute of limitations.

3. To dismiss as against the defendant Dr. Donald E. Wair the second amended complaint because sections 1985 and 1986 of Title 42, U.S.C.A., are unconstitutional and void.

ROBERT Y. THORNTON,
Attorney General of Oregon.

/s/ PETER S. HERMAN,
Assistant Attorney General, Attorneys for the Defendant Dr. Donald E. Wair.

[Endorsed]: Filed March 15, 1957.

[Endorsed]: No. 15782. United States Court of Appeals for the Ninth Circuit. Adolph G. Hoffman, Appellant, vs. C. H. Halden, Dr. Donald E. Wair, Dr. G. F. Keller and Dr. R. Sydney Hansen, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed November 14, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15782

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COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F. KELLER and DR. F. SYDNEY HANSEN,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

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ROBERT Y. THORNTON, Attorney General of Oregon;
PETER L. HERMAN, Assistant Attorney General,
Salem, Oregon,
Supreme Court Building,
For Appellee Wair.

LEO SMITH, District Attorney for Multnomah County;
WILLIS A. WEST, Chief Civil Deputy,
Multnomah County Courthouse,
Portland, Oregon,
For Appellees Halden and Hansen.

STEVENS NESS LAW PUB CO., PORTLAND, ORE. 2–58

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Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

JURISDICTION

This is an appeal from an order by Honorable William G. East, Judge, dated October 14, 1957 and entered October 15, 1957 dismissing appellant's second amended complaint upon the stated ground that the pleading failed to state a claim upon which relief could be granted against the appellees. Appellant filed notice of appeal October 22, 1957.

Jurisdiction was invoked under the United States Constitution and particularly Article I, Section 8, Article

IV, Section 4, Amendments XIII and XIV, and Laws of the United States, Title 18 U. S. C. 241, 242; Title 28 U. S. C. 1331 and 1343; Title 42 U. S.C. 1981-1988; Title 50 U. S. C. 203, which are commonly referred to as Civil Rights Laws.

PLEADING AND FACTS

Appellant's complaint states that from January 10, 1952 up to and including June 18, 1956 he was a victim of a continuing conspiracy by appellees to deprive him of constitutional and statutory rights and particularly those relating to equal protection of the laws, due process and the privileges and immunities clauses. Appellees are respectively Halden and Hansen, Deputy and County Health Officer of Multnomah County, Oregon; Wair, Superintendent of the Oregon State Mental Hospital, Pendleton, and Dr. Keller, a physician, who makes examinations in mental cases for the State. The complaint states that they acted under color and pretense of the Oregon laws in their capacities as state officers and not in their individual capacities (Tr. 5). The acts of appellees were done intentionally, maliciously, wilfully and appellant was selected for purposeful discrimination (Tr. 5-13). The acts were neither privileged nor compelled by law (Tr. 6-13). Specifically various appellees are charged with the following:

HALDEN AND HANSEN:

"1. Forcibly taking the plaintiff into custody on or about the 10th day of January, 1952, and again on or

about the 5th day of August, 1952, without first informing plaintiff of the charges against him or of the nature of the proceedings with which he was confronted and a refusal to exhibit a citation which was in their custody;

"2. Wilful deprivation of plaintiff's rights to select a physician of his own choice in direct contravention of the Laws of the State of Oregon;

"3. Wilful refusal on or about the 10th day of January, 1952, and again on the 5th day of August, 1952, to permit plaintiff to call or communicate with his counsel in time for said counsel to appear in his behalf despite the fact that he was under the custody and control of said defendants;

"4. Wilful failure to perform their duty to summon the District Attorney for Multnomah County or an Assistant District Attorney to be present at the hearing concerning plaintiff's competency and at a second hearing concerning his proposed commitment;

"5. Wilful refusal to permit plaintiff to summon witnesses in his own behalf and wilful refusal to give him an opportunity to prepare a defense to the charges against him;

"6. In intentionally confining plaintiff in an enclosure where persons charged with a crime were also incarcerated in direct violation of Oregon Law despite the fact that a suitable place for plaintiff's comfortable, safe and humane confinement was available;

"7. In threatening, coercing and intimidating plaintiff to prevent plaintiff from making any objections to his illegal detention;

"8. In threatening and intimidating and coercing plaintiff from exercising and availing himself of due process and of the due course of law;

"9. In wilful failure to act in good faith and pursuant to the mandate of State law. In the wilful violation of the order of the Circuit Court of Multnomah County, Oregon, issued on or about August 4, 1952, requiring that the plaintiff be brought before said Court, but instead defendants forcibly took plaintiff to a place of detention;

"10. In the wilful refusal of defendants to communicate to the Circuit Court of Multnomah County, Oregon, that the order of the Court had been ignored and plaintiff was being held by them in a place of detention against his wishes;

"11. In falsely filing a return of citation stating that they had followed the order of the Circuit Court of Multnomah County as set forth above;

"12. In intentionally suppressing the facts regarding plaintiff's illegal detention from the proper authorities and falsely assuring plaintiff that his liberty would not be impaired in any way by his attendance at the hearing conducted on or about January 10, 1952, despite the fact that said defendants were fully conversant with the purpose of said hearing;

"13. In wilfully participating without objection or remonstrance of any kind despite the fact that it was within their power to remonstrate in the hearing conducted on or about January 10, 1952, as aforesaid which hearing was wholly devoid of due process and which was convened under statutes unconstitutional and void;

"14. In causing all of that money and property in plaintiff's possession to be forcibly extracted from his person on or about August 5, 1952, thereby depriving plaintiff of the means of communicating or employing counsel or any other person to appear in his behalf;

"15. By directing plaintiff to remain silent and refuse to testify in his own behalf at the hearing which was held on or about the 10th day of January, 1952, in the Circuit Court of Multnomah County and by also informing plaintiff that it was unnecessary for him to obtain legal representation despite the fact that defendants knew that if plaintiff were not permitted to summon counsel that no one would appear at said hearing to protect or represent his interests;

"16. By assisting and forcibly removing plaintiff from the Courtroom on January 10, 1952, despite the fact that said defendants knew that various witnesses were preparing to testify adversely to plaintiff and that he would be given no opportunity to confront or hear the testimony of said witnesses;

"17. In refusing to assist in the restoration of the money and property forcibly seized from plaintiff's person on or about the 5th day of August, 1952;

"18. In the wilful coercion and intimidation of plaintiff to prevent him from exercising his rights under the Constitution of the United States and the laws of the State of Oregon."

DR. KELLER:

"1. That although said physician had been specifically ordered by the Circuit Judge of Multnomah County, Oregon, to make an adequate medical and psychological examination of plaintiff as a preliminary and as an adjunct of the hearing conducted on or about the 10th day of January, 1952, concerning plaintiff's competency, said physician wholly failed and refused to comply with said order and instead made only a superfiicial examination;

"2. That despite the fact that said physician realized that he did not have sufficient data to form an intelligent judgment concerning plaintiff's mental competency he nevertheless certified under oath to the Circuit Court that the plaintiff was incompetent despite the fact that a complete examination would have revealed that the contrary was the case;

"3. By intentionally signing a certificate containing information allegedly gathered concerning plaintiff by defendant Dr. Keller, or his subordinates, although he knew this information was extremely limited and he had made no effort to verify the same;

"4. By signing and verifying a statement concerning the plaintiff which contained numerous inaccuracies;

"5. By refusing and ignoring plaintiff's request at the time of said hearing that he be given an adequate mental examination as a necessary preliminary to any adjudication concerning his competency;

"6. By suppressing the facts regarding plaintiff's illegal detention from the proper authorities and participating in a hearing without remonstrance or objections of any kind despite the fact that it was within the power of said defendant to object when it became apparent that said hearing was wholly lacking in due process and immunities and the equal protection of the laws available to all citizens under the Constitution of the United States;

"7. In failing to remonstrate or object in any fashion despite the fact that it was within his power to object or remonstrate when plaintiff was given no opportunity whatever to cross-examine witnesses, was excluded from hearing the testimony of said witnesses, was given no opportunity to summon counsel or representative in his behalf or to testify, in any way except for a few preliminary statements, and that the District Attorney of Multnomah County was not present despite the statutory mandate to the contrary;

"8. By wilfully participating without objection or remonstrance whatever despite the fact it was in his power to remonstrate or object at a hearing which was convened under a statute unconstitutional and void;

"9. By refusing to make an examination of plaintiff while he was held at Morningside Hospital despite the

fact that it was his duty to do so on or about the 5th day of August, 1952;

"10. By refusing to immediately release plaintiff while he was held at said Morningside Hospital since he was apprised of the fact that plaintiff had been confined under proceedings wholly void;

"11. By refusing to direct that defendants Halden and Hansen deliver plaintiff to the Circuit Court of Multnomah County rather than to Morningside Hospital after he knew either personally or by and through his agents acting within the scope of their employment that defendants Halden and Hansen had wilfully disobeyed the order of the Court directing that said plaintiff be delivered to the Circuit Court rather than to Morningside Hospital on or about August 5, 1952."

DR. WAIR:

"1. Wilfully and intentionally forcibly restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew that defendant was being held illegally;

"2. Wilfully and intentionally forcibly restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew plaintiff was not suffering from mental illness;

"3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorities;

"4. By refusing to permit plaintiff to correspond or communicate with appropriate authorities, except to a limited extent;

"5. In threatening, coercing and intimidating plaintiff in an effort to force him to dismiss a civil action which plaintiff had filed in the Circuit Court of Multnomah County, Oregon."

Because of these acts of appellees, appellant was confined to the Oregon State Hospital, Pendleton, Oregon from August 6, 1952 to October 23, 1952.

The individual appellees filed motions to dismiss (Tr. 14-18) and the Court granted the motions upon the ground that the pleading failed to "state a claim upon which relief can be granted." (Tr. 19.)

STATEMENT OF THE CASE

The simple question presented is whether an individual who has been deprived of the equal protection of the laws, due process, and privileges and immunities by individuals acting under color of state law who have selected him for purposeful discrimination and victimization; who intentionally violated the order of the Circuit Court and the law of Oregon in many respects; who coerced and intimidated him to prevent him from exercising his constitutional rights; who directed him to remain silent and refuse to testify in his own behalf; who filed affidavits known to be false; who caused him to be imprisoned without due process; who refused to inform him of the charges against him and refused to allow him to summon his attorney or his witnesses; and who discriminated against him in many other particulars; has a cause of action under the Civil Rights law.

SPECIFICATIONS OF ERRORS

The District Court erred in granting appellees' motions to dismiss when appellant's complaint clearly set forth a violation of the Civil Rights Act.

ARGUMENT OF CASE

Title 42 USC Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 USC Section 1985 (2) provides:

"If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any ver-

dict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;"

Title 42 USC Section 1986 provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action."

Generally speaking Section 1983 has been applied to due process violations whereas Section 1985 has been applied to the denial of equal protection.

McShane v. Moldovan (CA 6), 172 F2d 1016, 1949.

Ortega v. Ragen (CA 7), 216 F2d 561, 1954, CD 349 US 940, 75 S. Ct. 786, 99 L. Ed. 1268.

They grant separate and distinct rights.

McShane v. Moldovan, supra.
Ortega v. Ragen, supra.
Bottone v. Lindsley (CA 10), 170 F2d 705, 1948.
Eaton v. Bibb (CA 7), 217 F2d 446, 1954.

Section 1983 requires the following:

1. An individual who acts "under color of any statute, ordinance, regulation, custom or usage of any State or Territory * * *." This the complaint specifically alleges. It is established that upon a motion to dismiss all allegations well pleaded must be considered true. There are numerous decisions which have held that in order to give rise to a violation the act must be done under color of State or Territorial Statute, ordinance, regulations, customs or usage, and not acting merely as private individuals.

Collins v. Hardyman, 341 US 651, 71 S. Ct. 937, 95 L. Ed. 253, 1951.

However in this case it is specifically stated that appellees acted under color of state law (Tr. 5). In any event the Supreme Court has held:

"Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State Law, is action taken 'under color of' State Law."

United States v. Classic, 313 US 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368.
Geach v. Moynahan (CA 7), 207 F2d 714, 1953.
Picking v. Pennsylvania R. Co. (CCA 3), 151 F2d 240, 1945.
Condra v. Leslie & Coal Co. (DC KY.), 101 F. Supp. 774, 1952.

While personal acts are excluded from the coverage of the Civil Rights Act, "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

McShane v. Moldovan (CA 6), 172 F2d 1016, 1021, 1949.

2. "* * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof * * *" The complaint expressly states that appellant is a citizen of the United States and Oregon (Tr. 3).

3. * * * "to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured * * *"

The Supreme Court has stated that the Civil Rights Law extends broadly to a deprivation of the rights, privileges and immunities secured by the Constitution, and this includes the 14th Amendment, and such privileges and immunities as are secured by the due process and equal protection clauses as well as the privileges and immunities clause of the amendment.

Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, 1939.

Can it be doubted that the following acts are all violations of the due process clause:

1. to seize an individual and to threaten and intimidate him from making any objections to his illegal detention;

2. to refuse to inform him of the charges against him;

3. to refuse to permit him to call or communicate with his attorney;

4. to refuse to permit him to summon witnesses in his own behalf or to allow him to prepare any sort of defense;

5. to intentionally suppress the facts regarding his illegal detention from the proper authorities;

6. to force appellant to remain silent and refuse to testify in his own behalf;

7. to deprive him of all of his money and other property;

8. in intentionally violating the order of the Court which specifically directed that appellant be brought before the Judge, but instead taking him to a place of incarceration.

There is also a clear cut denial of equal protection as will be discussed more fully under Section 1985.

Title 42, Section 1985 (2) requires the following elements:

1. "If two or more persons * * * "

Here four persons cooperated.

2. "conspire * * * " This is specifically stated in the complaint. Under the fundamental rule this must be assumed to be true when a motion to dismiss is filed (Tr. 4-5).

3. "for the purpose of impeding, hindering, obstruct-

ing, or defeating, in any manner, the due course of justice in any State or Territory * * * "

This is also specifically stated (Tr. 5).

4. "with intent to deny to any citizen * * * " The complaint alleges that appellant, Adolph Hoffman, is a citizen of the United States and Oregon (Tr. 3). It is also stated that appellees acted intentionally, wilfully, maliciously and purposefully (Tr. 5).

5. "the equal protection of the laws * * *,"

This is also specifically stated (Tr. 4).

Equal protection has been variously defined as follows:

1. 16 A - CJS Sec. 502, p. 297:

"It means, and is a guaranty, that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed;" citing:

State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422, 1947.
Smith v. State of Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84, 1940.

At p. 299:

"It is intended to secure and safeguard equality of right and of treatment against intentional and arbitrary discrimination;"

Beauharnais v. People of the State of Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, 1952.
Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 1921.

Sunday Lake Iron Co. v. Wakefield Township, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, 1918.

2. 12 AJ, p. 129:

"It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty and property, and in the pursuit of happiness."

3. Lynch v. U.S. (CA 6), 189 F2d 476, 479, 1951:

"It relates not only to right of protection from the officer himself, but also relates to right of protection due the prisoner by an arresting officer against injury by third persons. A culpable official's inaction may also constitute a denial of equal protection."

4. Ex Parte Knapp, 73 Id. 505, 254 P2d 411, 413, 1953:

"It means that equal protection and security shall be given to every person under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances."

It has been noted on many occasions that the "discriminatory exercise of a discretionary power vested is also a denial of equal protection of the laws."

Ex Parte Bridges, (D.C. Cal.), 49 F. Supp. 292, 1943.

It will be seen that this is specifically what was de-

nied to Adolph Hoffman in this case. It is stated in the complaint that the various appellees "did purposely and systematically and intentionally discriminate against plaintiff and subjected him to inequality of treatment in the following particulars * * * " (Tr. 5-6, 9, 12).

All of the cases indicate that the essential element in any complaint for denial of equal protection of the laws is the element of purposeful discrimination between persons.

Snowden v. Hughes, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497, 1944.
Morgan v. Sylvester, (D.C. N.Y.), 125 F. Supp. 380, 1954; Aff. 220 F2d 758, CD 76 S. Ct. 112.
Morgan v. Null (D.C. N.Y.), 120 F. Supp. 803, 1954.

This is precisely what occurred. As stated in the complaint Adolph Hoffman was purposefully, systematically and intentionally discriminated against when deprived of the equal protection of the laws and denied the rights and priviliges enjoyed by other citizens.

Most acts alleged in the amended complaint are violations of federal constitutional rights. Some relate to specific violations of Oregon law. It is true that the central inquiry is not whether state law has been violated, but whether a person has been deprived of his federal rights by one acting under color of state law.

Mueller v. Powell (CA 8), 203 F2d 797, 1953.

However, in determining the question whether appellant has a cause of action against state officials for violation of the appellant's federal civil rights, decisions

have held that the federal courts may resort to the requirements of the state law to ascertain the essential elements of false arrest.

Pollack v. City of Newark, New Jersey (D.C. N.J.), 147 F. Supp. 35, 1956.

In the construction of the pleading filed by appellant in this case certain fundamental rules are apparent. For example, various decisions have held:

1. A motion to dismiss for failure to state a claim should not be granted unless it appears a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 43 S. Ct. 540, 67 L. Ed. 977, 1923.

Sidebotham v. Robison (CA 9), 216 F2d 816, 1954.

Chicago and N.W.R. Co. v. First National Bank of Waukegan (CA 7), 200 F2d 383, 1952.

Keenen v. Looney (CA 10), 227 F2d 878, 1955.

Sherwin v. Oil City National Bank (CA 3), 229 F2d 835, 1956.

Byrd v. Bates (CA 5), 220 F2d, 1955 (and even then, the Court would not ordinarily dismiss the complaint except after affording every opportunity to plaintiff to state a claim upon which relief might be granted).

Fair v. U.S. (CA 5), 234 F2d 288, 1956.

Mullins v. Clinchfield Coal Corp. (D.C. Va), 128 F. Supp. 437, 1953, Aff. 227 F2d 881, CD 76 S. Ct. 1048, 351 U.S. 982, 100 L. Ed. 1496. (Action should not be dismissed upon pleadings where there is any reasonable possibility that plaintiff, within and without complaint may establish by evidence facts which would entitle her to relief).

Moore's Federal Practice 2d Ed, Section 8.13, p. 1653.

2. In determining the sufficiency of the complaint, the material facts are considered in the light most favorable to plaintiff.

Lewis v. Brautigam (CA 5), 227 F2d 124, 1950.
Dunn v. Gazzola (CA 1), 216 F2d 709, 711, 1954.
Ortega v. Ragan (CA 7), 216 F2d 561, 563, 1954.

Barron and Holtzoff, Federal Practice and Procedure, Volume 1, Section 356, page 644:

"The motion should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. The test is whether in the light most favorable to plaintiff, and with every intentment regarded in his favor, the complaint is sufficient to constitute a valid claim."

3. Complaint should be given a liberal construction.

Eaton v. Bibb (CA 7), 217 F2d 446, CD 76 S. Ct. 199, 1954.
Cool v. International Shoe Co. (CCA 8), 142 F2d 318, 1944.
Tobin v. Chambers Construction Co. (D.C. Neb.), 15 F.R.D. 47, 1952.

4. Courts look with disfavor upon the practice of terminating litigation by dismissing the complaint for insufficiency of statement.

Winget v. Rockwood (CCA 8), 69 F2d 326.
Garcia v. Hilton Hotels, International (D.C. Puerto Rico), 97 F. Supp. 5, 1951.

5. If there are multiple counts the motion will be denied if any of the counts is sufficient to sustain the action.

Bleecker v. Drury (D.C. N.Y.), 3 F.R.D. 325, 1944.

Barron and Holtzoff, Federal Practice and Procedure, Volume 1, Section 356.

It is well settled that when a motion to dismiss is filed it must be assumed that all well pleaded facts are true.

Federal Life Ins. Co. v. Ettman (CCA 8), 120 F2d 837, CD 314 U.S. 660, 86 L. Ed. 529, 62 S. Ct. 115.

MidWest Haulers v. Brady (CCA 6), 128 F2d 496, 1942.

Vilter Mfg. Co. v. Loring (CCA 7), 136 F2d 466, 1943.

Riley v. Dun & Bradstreet, Inc. (CA 6), 172 F2d 303, 1949.

As stated in Cyclopedia, Federal Procedure, Volume 5, Section 1593:

"For the purpose of a motion to dismiss under Rule 12(b) all the well pleaded facts appearing in the complaint and exhibits as supplemented by bill of particulars, are taken to be true for the purpose of the motion. The making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Putting it in another way, on a motion to dismiss a complaint on the ground of not stating a cause of action the ability of plaintiff to prove all its fact averments must be assumed."

Furthermore plaintiff is not required to plead all the

evidentiary facts upon which he intends to rely at the trial in order to avoid a dismissal for failure to state a cause of action.

Butcher v. United Electric Coal Co. (CA 7), 174 F2d 1003, 1949.

This Court in discussing the function of a motion to dismiss stated in Gruen Watch Co. v. Artists Alliance (CA 9), 191 F2d 700, 705, 1951:

"On occasion motions to dismiss supply a useful technique for the prompt disposition of suits, and the Federal Rules of Civil Procedure which permit judgment on the pleadings are useful indeed. But it must be borne in mind that in many a suit such a motion cannot take the place of submission of evidence and of findings of fact and conclusions of law. Every motion to dismiss must be viewed in light of Rule 8 (a), (e), and (f), Federal Rule Civil Procedure 28 U.S.C.A. Such a motion should not be granted unless it appears clearly that no cause of action is stated."

There is a large and growing number of cases which have permitted a recovery in similar situations:

1. Davis v. Turner (CA 5), 197 F2d 847, 1952. Plaintiff's complaint charged the Sheriff and the Deputy of Smith County, Texas entered her store without necessary warrants, conducted a search and found nothing unlawful. Immediately thereafter they arrested her, seized her violently by the arm and refused to permit her to consult an attorney and put her in jail. The Sheriff also refused to tell her what crime she was

charged with committing. The District Court granted the defendant's motion to dismiss but this was reversed by the Court of Appeals. Judge Holmes speaking for the Court stated that these facts gave rise to a cause of action under Section 1983 as follows:

"The motion to dismiss admitted to well-pleaded allegations of fact contained in the complaint, and we think that these allegations were sufficient to state a cause of action and to entitle the plaintiffs to a trial on the merits."

2. Lewis v. Brautigam (CA 5), 227 F2d 124, 1955. Plaintiff's complaint stated that defendant Deputy Sheriffs removed plaintiff from the County Jail to State Prison to prevent him from preparing his defense for a murder trial. It also stated that defendant State's Attorney ordered these deputies to force plaintiff to pose for photographs showing him in convict garb at the State Prison and to enter a plea of guilty. The Sheriff was also joined as a defendant because of the acts of his Deputies although he did no overt act himself. The State's Attorney also filed a petition stating he believed that the investigation and safety of plaintiff during the investigative period would be best served by causing him to be transfered to the State penitentiary. He allegedly requested this order without notice although in fact he knew that the petition was not well founded and was contrary to Florida Law. The Court of Appeals held the complaint stated a cause of action as follows (LC 127):

"The defendants would have us treat the complaint

as filed strictly under the statute providing against conspiracy to interfere with civil rights, 42 U.S. C.A. 1985 (footnote 1, supra), which has been often held to reach a conspiracy to deprive one of civil rights only when its object is a deprivation of equality, and not to cover conspiracies to deny due process. See Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; Whittington v. Johnston, 5 Cir., 201 F2d 810, 811; Mitchell v. Greenough, 9 Cir., 100 F2d 184, 187; McShane v. Moldovan, 6 Cir., 172 F2d 1016, 1018; Bottone v. Lindsley, 10 Cir., 170 F2d 705, 706; Dunn v. Gazzola, supra; Ortega v. Ragen, supra. If so, we would have to determine whether there has been a violation of that mere minimum of equal protection secured both by the due process clause and by the equal protection clause of the Fourteenth Amendment. See Traux v. Corrigan, 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254; 12 Am. Jur., Constitutional Law, 472. We do not think, however, that we are required so to treat the complaint. It charges that the conspiracy was actually carried into effect. If, thereby, the plaintiff was deprived of any rights, privileges or immunities secured by the Constitution and laws, the gist of the action may be treated as one for the deprivation of such rights under the broader civil rights statute, 42 U.S.C.A. 1983 (footnote 2, supra). See Watkins v. Oaklawn Jockey Club, 8 Cir., 183 F2d 440, 441.

"Under that statute, it is now well settled that law officers who exact confessions by violence can be held civilly liable. See Geach v. Moynahan, 7 Cir., 207 F2d 785. * * * Indeed, under 18 U.S.C.A. 242, which is the

criminal counterpart of 42 U.S.C.A. 1983, officers who exact confessions by violence can be held criminal liable. Williams v. United State, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774, affirming 5 Cir., 179 F2d 656; Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495. As against the defendants Mills and Blackford, therefore, it is clear that the complaint states a claim upon which relief can be granted.

"As to the defendant Kelly, the sheriff of Dade County, it seems that under the laws of Florida the acts of his deputy, done under color of office, may be imputed to the sheriff. * * *

"As to the State's Attorney, Brautigam, the question is more difficult. A prosecuting attorney has many duties involving the exercise of grave discretion in the performance of which he is a quasi-judicial officer representing the state. Segars v. State, 94 Fla. 1128, 115 So. 537; 42 Am.Jur., Prosecuting Attorneys, 2. Ordinarily, when so acting, he cannot be compelled to answer to a private citizen for errors in the determination either of law or of fact. 42 Am.Jur., Prosecuting Attorneys, 274. For full and able discussions of the exemption vel non of public officers from liability under the civil rights acts, because of the discretionary nature of their duties, see the recent cases of Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Morgan v. Sylvester, 2 Cir., 220 F2d 758, affirming D.C., 125 F. Supp. 380; Francis v. Lyman, 1 Cir., 216 F2d 583; Dunn v. Gazzola, 1 Cir., 216 F2d 709, and Cobb v. City of Malden, 1 Cir., 202 F2d 701, 706; see also, Gregoire v. Biddle, 2 Cir., 177

F2d 579. We need not, however, explore that difficult and important field of law upon the present appeal, further than to say that a quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office. Cooper v. O'Connor, 69 App.D.C. 100, 99 F2d 135, 138, 118 A.L.R. 1440; 43 Am.Jur., Public Officers, 277."

3. McShane v. Moldovan (CA 6), 172 F2d 1016, 1949.

Plaintiff alleged a conspiracy on the part of the Justice of Peace, a complaining witness, Constable and others in that she was arrested in her home without a warrant on a charge of assault. She asserted that she demanded a jury trial by an impartial jury pursuant to the Michigan law and the Justice of the Peace instructed the Constable to prepare a list. However, the constable, together with complaining witness and the Justice of the Peace, fraudulently prepared a list from which all but two competent jurors were excluded. The Jurors selected were allegedly under political obligation to appellees and known to be hostile to appellent. As a result she was unlawfully imprisoned, tried without due process, suffered an illegal conviction and sentenced and was compelled to appeal to the Circuit Court where she was finally acquitted. It was held that while acts of the officers within the ambit of their personal pursuit were plainly excluded from the civil rights law "acts of officers who undertake to perform their special duties are included

where they hew to the line of their authority or overstep it." (LC 1021.)

4. Burt v. City of New York (CCA 2), 156 F2d 791, 1946.

A registered architect sued the City of New York and its officials charging that he was required to make applications to officials of the building department before he could undertake his employment and these officials deliberately misinterpreted and abused their statutory power by denying his application or imposing upon him unlawful conditions while they unconditionally approved applications of other architects similarly situated. Judge Learned Hand speaking for the Court held that this stated a cause of action under the Civil Rights Law and a denial of equal protection.

5. Dinwiddie v. Brown (CA 5), 230 F2d 465, 1956, C.D. 76 S.Ct. 1041.

The Court held that where state officers conspired with private individuals to defeat or prejudice litigants in the State Court, the litigant was thereby denied equal protection and a cause of action was created cognizable by the Federal Courts under the provisions of the Federal Civil Rights Law. This is precisely what is charged in the case at bar.

6. Picking v. Pennsylvania R. Co. (CCA 3), 151 F2d 240, 1945.

Picking was arrested pursuant to a request for extradition. He alleged that defendant Justice of the Peace refused to give him a hearing required by the law and

that the defendants district attorney of New York, the Pennsylvania Railroad, the Governors of New York and Pennsylvania and various police officers of the City of New York were parties to a conspiracy to deprive him of his liberty without due process. The Court held he had stated a cause of action under the Civil Rights Law.

7. Geach v. Moynahan (CA 7), 207 F2d 714, 1953.

Complaint alleged that two Chicago policemen came to plaintiff's home and upon being admitted accused him of having committed a crime. After they entered his home, defendants seized personal papers without a warrant and informed him that he was under arrest and was to be taken to the police station. Upon arrival at the station they threatened, intimidated and beat him and "in general" subjected him to the "usual third-degree practices used by members of the Chicago police department to obtain information and/confessions." A judgment of dismissal was reversed by the Court of Appeals. The Court quoted from the decision of Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, 1946, as follows:

"Respondents' contention did not show that petitioners' cause is insubstantial or frivilous, and the complaint does in fact raise serious questions, both of law and fact, which the District Court can decide only after it has assumed jurisdiction over the controversy." It seems undeniable that the complaint at bar is far from frivilous and is of the utmost importance to every citizen.

8. Glicker v. Michigan Liquor Control Commission (CA 6), 160 F.2d 96, 1947.

Appellant was the owner of a Class C license as a Michigan citizen authorized to sell liquor in Detroit. The license was revoked after notice and hearing by a member of the Commission because appellant allegedly sold liquor to minors. Appellant contended that the license was unlawfully and illegally revoked, a deliberate discrimination because of political reasons, and was done deliberately for the purpose of treating appellant in a different manner than any other owner of a Class C liquor license and in violation of her rights under the 14th Amendment. Judgment of dismissal was reversed by the Court of Appeals. The Court stated (LC 99):

"The equal protection clause of the Fourteenth Amendment is a right in itself, separate and independent from the rights protected by the privileges and immunities clause of the Fourteenth Amendment. The privileges and immunities clause is restricted to citizens of the United States; the equal protection clause extends its protection to 'any person' within the jurisdiction of the state. In Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254, 27 ALR 375" * * * The Court said —"The guarantee was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression or inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

"* * * In Sunday Lake Iron Company against Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154, the Court said at page 352 of 247 U.S., at page 495 of 38 S.Ct., 62 L.Ed. 1154—The purpose of the equal

protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasoned by express terms of a statute or by its improper execution through duly constituted agents."

"* * * In Snowden v. Hughes, supra, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497, where it is stated— 'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination'."

(LC 100) "* * * While the Federal Government does not have the right to regulate matters, which are exclusively under the control and regulation of the state, yet it does have the right, by virtue of the Fourteenth Amendment, to prevent such regulation from being arbitrary or discriminatory. Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 823; Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336.

"* * * The fact that the appellant is in the liquor business does not release the state from the restrictions on its regulatory powers above referred to. It may authorize the state to impose more stringent regulations against those engaged in that business than are imposed against those engaged in other callings, 'but it affords no justification for discriminating between persons similarly situated who may be, or who may desire to become, engaged in that calling'."

If the Court is vigilant to prevent an individual from intentional discrimination and to unequal treatment where a liquor license is involved, is invested with equal powers to guard against unjust and unequal treatment where personal liberties are infringed.

9. Bomar v. Keyes (CCA 2), 162 F2d 136, 1947.

Plaintiff was a probationary teacher of home economics in a Brooklyn High School. She was discharged from that position because of a complaint lodged against her on the grounds she was absent from her teaching from March 7, 1939 to April 4, 1939 while serving upon a Federal Jury. Judgment of dismissal was reversed. Judge Learned Hand stated that cause of action was stated under the Civil Rights Law and since the plaintiff was denied a right granted by the federal statute and the court was invested with ample jurisdiction to see that federal rights of this nature were protected.

10. State for the Use and Benefit of Temple v. Central Surety and Insurance Corp. (D.C. Ark.), 102 F. Supp. 444, 1952.

Complaint charged that defendants acting under color of law, forced the truck in which plaintiff was riding off of the public highway, threatened plaintiffs with a drawn revolver, forcibly and falsely restrained them of their liberty for ten minutes and that the other defendants conspired with defendant to force them off the highway and deprived them of their rights as citizens. They were not charged with the violation of any specific law and in fact they were not violating the law.

It was held that since it did not clearly appear that there was no genuine fact issue involved defendant's motion for a summary judgment would be denied.

11. There are also a large number of cases which have held that law officers who extract confessions by violence can be held civilly liable under Civil Rights Law.

Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 ALR 1330, 1945.
Williams v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L. Ed. 774, 1951.
Watkins v. Oaklawn Jockey Club (CA 8), 183 F2d 440, 441, 1950.

12. Morgan v. Null (D.C. N.Y.), 120 F. Supp. 803, 1954.

Complaint alleged that various state officers participated in a conspiracy whereby under color of state law plaintiff was unlawfully seized and detained. This was held to state a cause of action for violation of the Civil Rights Law.

There are also a number of cases dealing with labor meetings and the like which have been held to give rise to civil damages under the act. For example, in Condra v. Leslie & Clay Coal Company (D.C. Ky.), 101 F. Supp. 774, 1952, the complaint alleged that defendant company, certain individuals engaged in coal mining operations, state officers and certain Kentucky counties who were also defendants, conspired among themselves and with others to deprive plaintiff of their constitutional rights of equal protection and privileged and immunities by means of threats and force while plaintiffs were

engaged in attempting to disseminate the information concerning the labor management relation acts to employees of the operators. Motion to dismiss was overruled. In accord Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, 1939.

13. Cooper v. Hutchinson (CA 3), 184 F2d 119, 1950. 1950.

Plaintiff alleged that out of state counsel had been admitted pro hac vice to defend him against a murder charge. The trial judge, subsequently without a hearing or any showing denied the attorney the privilege of appearing. The Court held that this was a deprivation of due process and therefore under Section 1983 it had jurisdiction to entertain a suit for injunctive relief against against the judge.

There are a large number of other cases which could be cited but in the interest of brevity they will be omitted.

In the vast majority of the cases under the Civil Rights Law, a violation of the equal protection provisions were stated. In order to give rise to violation of equal protection the cases have indicated that the following elements must be present:

1. There must be action under color of law not merely individual action;

2. There must be a purposeful and systematic and intentional discrimination;

3. The plaintiff must be subjected to an inequality of treatment;

4. The act must not be privileged or compelled by law;

5. There must be damages suffered as a result.

It will be noted that each of these elements is expressly pleaded in the second amended complaint filed in this proceeding. (Tr. 4-13.) Under the fundamental rule all allegations that are pleaded must be assumed to be true.

There are a number of decisions which have recognized that the doctrine of privilege applies to judges, and legislators in practically all situations;

> Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019, 1951.

although as pointed out by 66 Harvard Law Review 1285, 1286, "Congress probably intended to do away with immunity in suits brought under the acts." (page 1296). And this is the express holding of the Picking v. Pennsylvania R. Co. case, 151 F2d 240, CCA 3, 1945. Most cases have, however, recognized the immunity of judges and legislators. There are also a limited number of cases which had extended the privilege to so-called quasi-judicial officers acting pursuant to the order of the Court or while exercising a discretionary function. Thompson v. Heither (CA 6), 235 F2d 176, 1956. But the cases are clear that their immunities apply only where they act within the scope of their authority and in obedience to the order of the Court. Lewis v. Brautigam, supra at 129; Cooper v. O'Connor, 69 App. D.C. 100, 99 F2d 135, 138; 43 A.J. Public Officers, §277. Furthermore, it

has been noted on the occasions the "discriminatory exercise of a discretionary power vested in an administrative agency may constitute a denial of equal protection of laws." Ex Parte Bridges (D.C. Cal.), 49 F. Supp. 292, 299, 1943.

Lewis v. Brautigan, supra, at 129.
Cooper v. O'Connor, 69 App. D.C. 100, 99 F2d 135, 138.
43 Am. Jur., Public Officers, §277.

In this case it expressly stated in the complaint that the appellees did not act within the scope of their authority. Furthermore, appellees Hanson and Holden intentionally violated the order of the Court. None of the appellees were vested with any discretionary power with the possible exception of defendant Wair, the Superintendent of the State Mental Hospital and as stated in the complaint he exercised his authority in a willful, malicious, intentional and discriminating way. (Tr. 12.)

We respectfully urge the Court to permit our client to have his day in Court. Judge McCulloch felt that the case had sufficient merit to warrant setting aside a previous order dismissing the case for failure to prosecute. (Supp. Tr. 31.)

The decided tendency is to give the Civil Rights Acts the interpretation which their language demands. A recent article in 26 Indiana Law Journal, page 379 stated:

"While the Collins case in effect prevent extension of the remedy to embrace private infringements of Civil Liberties, other recent developments under Section 43 and 47 (3) indicated that, despite their antiquity, long

dormancy, vague phraseology and other defects, the Courts are beginning to accord them the scope and significance which Congress originally intended." In any event, as noted by this Court in Gruen Watch Co. v. Artists Alliace (CA 9), 191 F2d 700, 1951 (LC 705) "a motion cannot take the place of submission of evidence and the findings of fact and the conclusions of law." The language of Justices Stone and Cardoza in their concurring opinion in Bordens Farm Products v. Baldwin, 293 U.S. 194, 213, 55 S.Ct. 187, 193, 79 L.Ed. 281, 291, 1934, seems completely appropos:

"We are in accord with the view that it is inexpedient to determine grave constitutional questions on a demurrer to a complaint, or upon an equilivant motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clear.

We respectfully urge Your Honors to give Mr. Hoffman an opportunity to present evidence which will establish that he was deprived of most of the important safeguards of The Federal Constitution.

Respectfully submitted,

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